

VISTAR KENTUCKY

Employer,

and

GENERAL DRIVERS, WAREHOUSEMEN  
AND HELPERS LOCAL UNION NO. 89,  
AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,

Petitioner.

Case No. 09-RC-260125

## Introduction

Petitioner filed an RC petition with Region 9 on May 8, 2020, seeking a representation election with respect to Respondent's approximately seventeen (17) drivers. Petitioner and the Employer stipulated to the bargaining unit shortly thereafter. They participated in a telephone conference conducted by hearing officer from Region 9 on May 18, 2020, however, to argue their respective positions as to whether the election should be conducted by a manual vote or by mail ballot. The Regional Director then considered the parties' arguments on this matter and ordered that the election be conducted by mail ballot. In so doing, she exercised her discretion to

maintain the Region's ongoing mandatory telework policy.

Claiming that this case is "remarkably similar" to *Atlas Pacific Gulftech*, No. 27 RC-258742, the Employer has now filed the present motion for an emergency stay.

### **Argument**

As a threshold matter, it is well settled that a Regional Director's exercise of the broad discretion afforded by the Board in selecting the appropriate mechanics for an election will not be overturned "unless a clear abuse of discretion is shown." *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998), citing *San Diego Gas & Electric*, 325 NLRB at 1144, 1145, fn. 4. The Regional Director's decision directing a mail ballot election is well reasoned and consistent with her broad grant of discretion to determine the mechanics for an election.

We also note that the Regional Director specifically addressed the Board's decision in *Atlas Pacific*. In the present motion, however, the Employer pretends that the Regional Director did not address that decision. In this regard, while the Employer points out that the Board recently granted an emergency motion in the *Atlas Pacific* case, it rather disingenuously neglects to point out that the Board lifted it one week later, while simultaneously denying the employer's motion for review. *See 27-RC-258742*, Board Decision, May 8, 2020.<sup>1</sup> That perhaps is explained by the fact that the Board's reasoning in its May 8, 2020 decision, fully supports the Regional Director's sound decision in the present case. Specifically, in *Atlas Pacific*, the Board noted that the Regional Director's principle concern over a manual ballot was for the safety of NLRB personnel. In the present cases, the Regional Director's concern over a manual ballot likewise involved the safety of the election participants, including NLRB personnel and others who

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<sup>1</sup> We also note that the Board has even more recently denied an employer's request for review of a Regional Director's decision and direction of a mail ballot election. *Roseland Community Hospital*, No. 13-RC-256995.

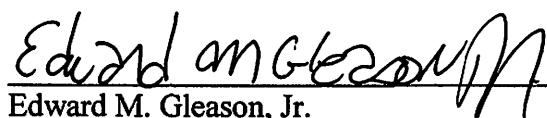
necessarily would be in close contact with one another while conducting an in-person election. The Regional Direction also noted that the election would take place in Jefferson County, where there remains a significant and growing number of COVID-19 infections. When weighing the risks associate with the conduct of a manual ballot, the Regional Director appropriately and very reasonably decided that those risks far outweighed any decision to waive the Region's ongoing telework order to its personnel.

The Regional Director's decision and her analysis does not reflect an abuse of discretion; to the contrary, it is the exercise of sound judgment, common sense and concern for the safety of the election participants and their families. Simply because the Employer may choose to wallow in a setting that necessarily invites a heightened likelihood of COVID-19 infection does not mean that the other, more prudent, participants in the election must be dragged into an abyss crafted by the Employer's recklessness and transparent desire only to delay and starve its employees in the exercise of their federally protected rights to select their bargaining representative.

### **Conclusion**

For all the foregoing reasons, Petitioner respectfully requests that the Board deny the Employer's request for an emergency stay of the election.

Respectfully submitted,



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June 5, 2020

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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VISTAR KENTUCKY

Employer,

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GENERAL DRIVERS, WAREHOUSEMEN  
AND HELPERS LOCAL UNION NO. 89,  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 5, 2020, I caused a true and correct copy of the foregoing brief in *Opposition to Employer's Emergency Motion to Stay the Election* to be served upon Employer's Counsel, Ross M. Gardner, JACKSON LEWIS, 10050 Regency Circle, Suite 400, Omaha, NE, 68114, at Ross.Gardner@jacksonlewis.com, Acting Regional Director for NLRB Region 9, and with the Executive Secretary through the Board's E-Filing system.

Respectfully submitted,

/Edward M. Gleason, Jr.

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